# Paragro Sdn Bhd v Tanjung Tiara Sdn Bhd

HIGH COURT (MIRI) — SUIT NO MR27 OF 1995
ZULKIFLI BAKAR J
22 JANUARY 2010

*Contract Law — Agreement to extract timber — Series of simultaneous agreements — Whether plaintiff had obtained wrong type of timber licence — Whether agreement inoperative and unenforceable — Whether plaintiff suffered loss and damage — Calculation of — Whether there was merchantable timber to be extracted from defendant's land*

*Words and Phrases — Meaning of merchantable timber — Whether technical interpretation preferred*

The defendant entered into a series of simultaneous agreements with the plaintiff for the sale and purchase of merchantable timber on the defendant's land ('the agreement'). Under the agreement the plaintiff was to obtain a timber licence to extract timber from the defendant's land. When the defendant attempted to give the agreement for the sale of timber on the defendant's land, a restrictive interpretation, the plaintiff commenced the instant action. It was the plaintiff's contention that it had suffered loss and damage when it was deprived of extracting merchantable timber from the defendant's land. The defendant submitted that the type of timber licence the plaintiff had obtained could not be the type of timber licence contemplated in the agreement. The defendant further submitted that the letters from the Kementerian Perancangan Sumber ('the Ministry') were a rejection of the timber licence, which in turn made the agreement inoperative. The plaintiff maintained that it had obtained the necessary timber licence and that it could have extracted merchantable timber of at least 30 or 40 tons per acre from the defendant's land. However, the defendant claimed that its land had been cleared of all merchantable timber leaving only pole-sized timber standing. The defendant's position had thus gone from the Ministry's rejection letters, to wrong type of licence and eventually to no merchantable timber left on the defendant's land.

**Held**, allowing the plaintiff's claim with costs:

(1) After reviewing the evidence adduced it was found that the timber licence obtained by the plaintiff could come within the meaning of a timber licence under the agreement. The special conditions in the said timber

licence were all compelling reasons for supporting this finding and there was no merit in the defendant's submission that the timber licence would not allow the whole of its land to be cleared. Further, the reasons for the defendant rejecting the plaintiff's timber licence became less credible in the light of the fact that it had authorised another company, Woodshine Sdn Bhd (WSB) to apply for timber licences to extract timber from its land (see paras 6–10).

(2) On the facts taken as a whole, the letters from the Ministry per se did not make the agreement between the parties inoperative and unenforceable. It would therefore follow that the defendant was in breach of the agreement when it refused to allow the plaintiff to extract timber from its land after the latter had obtained the timber licence (see paras 18–19).

(3) The plaintiff had suffered loss and damage when it had lost the benefits of the agreement. Its loss would be the amount of merchantable timber on the land. After evaluating the evidence it was found that merchantable timber in the present case meant timber, which had commercial value and would fetch a price in the market from a buyer willing to buy such timber. Although the defendant claimed that there was no merchantable timber left on its land and neither the plaintiff nor the defendant were able to support much of what they claimed in the form of records, the court found that there was merchantable timber to be extracted from the defendant's land which was not negligible or confined to poles as the defendant had contended. Instead it was found that 40 tons of timber was a realistic volume of merchantable timber that could be extracted from the defendant's land had the agreement been performed. Based on the fact that a profit of RM250 per ton was achievable, it was further found that an area of 12,000 acres would yield total profits of RM120m (see paras 20, 22, 41 & 42).

**[Bahasa Malaysia summary**

Defendan menandatangani beberapa perjanjian serentak dengan plaintif bagi jual beli kayu balak boleh niaga dari tanah defendan ('perjanjian tersebut'). Di bawah perjanjian tersebut, plaintif perlu mendapatkan lesen pembalakan untuk menebang kayu balak dari tanah defendan. Apabila defendan cuba memberi perjanjian jualan kayu balak dari tanah defendan dengan tafsiran terhad, plaintif memulakan tindakan ini. Adalah menjadi hujahan plaintif bahawa ia telah mengalami kehilangan dan kerugian apabila ia dinafikan menebang kayu balak boleh niaga dari tanah defendan. Defendan berhujah bahawa jenis lesen pembalakan yang diperolehi plaintif bukanlah lesen yang dipertimbangkan dalam perjanjian tersebut. Defendan selanjutnya menghujah bahawa surat-surat daripada Kementerian Perancangan Sumber ('Kementerian tersebut') merupakan penolakan lesen pembalakan tersebut, yang menjadikan perjanjian tersebut tidak berkuat kuasa. Plaintif menegaskan bahawa ia telah mendapatkan lesen pembalakan yang diperlukan dan bahawa ia boleh

menebang kayu balak boleh niaga sekurang-kurangnya 30 atau 40 tan seekar dari tanah defendan. Walau bagaimanapun, defendan mendakwa bahawa tanahnya telah dibersihkan daripada kesemua kayu balak boleh niaga dan hanya terdapat kayu balak sebesar tiang yang tinggal.

**Diputuskan**, membenarkan tuntutan plaintif dengan kos:

(1) Setelah mengkaji semula keterangan yang dikemukakan didapati bahawa lesen pembalakan yang diperolehi plaintif boleh termasuk dalam maksud lesen pembalakan di bawah perjanjian tersebut. Syarat-syarat istimewa dalam lesen pembalakan merupakan alasan-alasan yang mendorong untuk menyokong keputusan ini dan bahawa tiada merit dalam hujahan defendan bahawa lesen pembalakan tidak membenarkan keseluruhan tanahnya dibersihkan. Selanjutnya, sebab-sebab bagi defendan menolak lesen pembalakan plaintif menjadi kurang dipercayai berikutan dengan fakta bahawa ia telah memberi kuasa kepada syarikat lain, Woodshine Sdn Bhd ('WSB') untuk memohon lesen-lesen pembalakan untuk menebang kayu balak dari tanahnya (lihat perenggan 6–10).

(2) Daripada fakta-fakta secara keseluruhannya, surat-surat daripada Kementerian semata-mata tidak menjadikan perjanjian antara pihak-pihak tidak berkuat kuasa dan tidak boleh laksana. Oleh itu, defendan memungkiri perjanjian tersebut apabila ia enggan membenarkan plaintif menebang kayu balak dari tanahnya setelah plaintif berjaya mendapatkan lesen pembalakan (lihat perenggan 18–19).

(3) Plaintif telah mengalami kehilangan dan kerugian apabila ia hilang faedah-faedah perjanjian tersebut. Kehilangannya adalah jumlah kayu balak boleh niaga dari tanah tersebut. Setelah menilai keterangan, didapati bahawa kayu balak boleh niaga dalam kes ini bermaksud kayu balak yang mempunyai nilai komersial dan akan terjual dengan harga pasaran daripada pembeli yang mahu membeli kayu tersebut. Walaupun defendan mendakwa bahawa tiada kayu balak boleh niaga yang masih terdapat di tanahnya dan plaintif juga defendan tidak boleh menyokong apa yang mereka dakwa dalam bentuk rekod-rekod, mahkamah mendapati bahawa terdapat kayu balak boleh niaga yang boleh ditebang dari tanah defendan yang bukannya sedikit dan tidak sebesar tiang lampu seperti yang dikatakan defendan. Malah, didapati bahawa 40 tan kayu balak merupakan jumlah realistik bagi kayu balak boleh niaga itu yang boleh ditebang dari tanah defendan jika perjanjian tersebut dilaksanakan. Berdasarkan fakta bahawa keuntungan berjumlah RM250 se tan boleh dicapai, selanjutnya didapati bahawa kawasan seluas 12,000 ekar akan menjana keuntungan RM120 juta (lihat perenggan 20, 22, 41 & 42). ]

**Notes**

For cases on contract law in general, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2422–5750.

*Ivan Hussein (Ivan Hussein Advocates) for the plaintiff.*
*KY Lin (Kadir, Wong, Lin & Co Advocates) for the defendant.*

**Zulkifli Bakar J:**

**[1]** The subject matter of this case concerns an agreement P15 between the plaintiff and the defendant on the sale and purchase of merchantable timber on the defendant's land, Lot 63 Sawai Land District.

**[2]** From the evidence and the submissions, P15 was part of a series agreements entered into simultaneously, in particular, the following:

(a) The sale of shares in Tanjung Tiara Sdn Bhd ('TT') to Mr Ha Tiung Noon and his wife, which came under agreement P13.

(b) The agreement P13 also provided for the formation of Paragro Sdn Bhd, the plaintiff herein, which shareholding structure was set out in the shareholders' agreement P14.

(c) The sale of timber on TT's land, Lot 63 Sawai Land District, referred to in P15, was then found under P15.

**[3]** Agreement P13 made provisions for agreement P15 to be entered into to give such additional benefits much in the way of supplementing P13. The defendant's approach to give a restrictive interpretation on the terms of P15 would surely defeat the entire purpose. The end result would be to allow the defendant to retain the entire benefit of the timber on Lot 63, Sawai Land District.

**[4]** With due respect, I found that it is hard to accept the testimony of DW4 that PW4 gave him instructions to limit the ambit of P15. There is no reason for PW4 to do something that would be detrimental to the plaintiff especially if P15 was intended to give supplementary benefits to P13. The defendant's shareholders enjoy a special position that the said shareholders also own half of Paragro Sdn Bhd under P14, so they will still, in the worse case, enjoy half of the benefits of the timber on Lot 63, Sawai Land District.

**[5]** There was surprisingly no definition for a timber licence in P15, although DW4, being the lawyer who prepared P15, tried to explain why

timber licence No OT/9004 could not be the type of timber licence contemplated in P15. A similar explanation was offered by DW3, which repeatedly emphasised cl 2(c) of P15.

**[6]** After reviewing the evidence on this issue, I have come to a finding that OT/9004 could come within the meaning of a timber licence under P15. On the face of it, and from the evidence given during trial, OT/9004 is obviously a type of forest licence.

**[7]** The special conditions in the licence, references to the many species of timber, the rates of royalty payable and security deposit based on two months estimated royalty are all compelling reasons to support my findings.

**[8]** I do not find any merit to the defendant's argument that OT/9004 would not allow the whole of Lot 63, Sawai Land District to be cleared. Although an OT licence is of fixed duration, that by itself would not prevent a series of OT licences to be taken out to eventually allow all the timber on Lot 63, Sawai Land District to be extracted. Exhibits P8 and P9 support my findings.

**[9]** The reasons for the defendant to reject OT/9004 become all the less credible after it emerged during trial that the defendant had authorised Woodshine Sdn Bhd to apply for OT licences P8 and P9 to extract timber from Lot 63, Sawai Land District which goes back to my earlier point.

**[10]** I do not find that the defendant had been forthright as far as the knowledge and participation of Woodshine Sdn Bhd in the extraction of timber in Lot 63, Sawai Land District was concerned. I was hardly impressed with the explanations of DW3 and DW5 as to exhs P5, P6, P8 and P9.

**[11]** I am also aware that linked with this issue is whether the timber licence referred to in P15 means the unlogged area. I need only to go back to the principal agreement P13 to find that the subject matter has always been the plantation land (Lot 63 Sawai Land District) owned under Tanjung Tiara Sdn Bhd.

**[12]** As the sale of shares under P13 did not seem to be dependant on the timber on Lot 63, Sawai Land District, there was only one provision in P13 for the timber to be sold to Paragro Sdn Bhd, which shareholding structure had been agreed under the terms of P14.

**[13]** If the type and size of timber and whether from the logged or unlogged area of Lot 63, Sawai Land District were so crucial, I am sure that the necessary provisions would have been spelt out in the agreement had the parties so

intended. DW3 claimed that he took instructions from PW4 as well as DW5, whereby DW5 was very experienced in the timber industry. A

**[14]** Under the circumstances, on a balance of probabilities there is insufficient justification to interpret P15 in the way that the defendant did and the way the defendant would like the court to do. B

**[15]** I now come to the issue of whether the letters dated 27 May 1994 ('P17') and 3 October 1994 ('P19') from Kementerian Perancangan Sumber were a rejection of a timber licence such as to make P15 inoperative. C

**[16]** The effect of those letters was to uphold a policy to allow the existing licensee, Bintulu Lumber Development Sdn Bhd ('BLD'), to complete the logging under their timber licence after Lot 63, Sawai Land District was alienated. Here, BLD was given two years to complete logging on Lot 63, Sawai Land District, while at the same time allowing the defendant as the landowner to progressively develop their plantation. D

**[17]** Although P15 required the defendant to obtain the timber licence, I do not see any effort on their part. It was only after OT/9004 had been obtained that the defendant responded by writing letters which were tendered as exhs P29 and P30. E

**[18]** On the facts taken as a whole, I find that the said letters per se do not make P15 inoperative and unenforceable. F

**[19]** It must therefore follow that the defendant was in breach of P15 when it refused to allow P15 to be performed when OT/9004 being a type of timber licence was issued. G

**[20]** The next question is whether the plaintiff had suffered loss and damage. My answer would be in the affirmative, as the plaintiff had obviously lost the benefits of P15. H

**[21]** As Lot 63, Sawai Land District has been cleared and planted with oil palm, the other reliefs sought by the plaintiff have been overtaken by events. It remains that the assessment of the plaintiff's loss would be the amount of merchantable timber on Lot 63, Sawai Land District, which brings the question of the definition of merchantable timber, and how much, if any, can be extracted from Lot 63, Sawai Land District. I

**[22]** Merchantable timber is again not defined in P15, and there are conflicting evidence had been adduced during this trial. Having heard all the witnesses, and also applying a sensible approach in evaluating such evidence, I am inclined to make a finding that merchantable timber means timber which has commercial value, and would fetch a price in the market from a buyer willing to buy such timber.

**[23]** I do not favour a technical interpretation that merchantable timber must be of a certain minimum size or specification, as it cannot be that timber falling below such size would not be merchantable timber, even if there was a demand and market for such timber.

**[24]** The plaintiff called witnesses to give evidence that a survey had been carried out whereby timber of at least 30 tons ('PW1'), or 40 tons ('PW4') per acre could be extracted from Lot 63, Sawai Land District.

**[25]** On the other hand, witnesses for the defendant gave evidence that only a few trees of small sizes (poles) were left on Lot 63, Sawai Land District, after BLD completed their logging activities, except for DW2 who claimed that BLD took 15–20 tons of timber below 45cm in diameter per acre from Lot 63, Sawai Land District.

**[26]** Just as the plaintiff's witnesses have not been able to produce records of their socalled random surveys of the volume of timber on Lot 63, Sawai Land District, the defendant has also not been able to support much of what they claim in the form of records.

**[27]** The plaintiff can obviously claim any amount of timber on Lot 63, Sawai Land District now that the land has been cleared for plantation, but to rebut such claims as baseless should be very easy for the defendant to do by producing either records from BLD or Woodshine Sdn Bhd of the volume of timber left on Lot 63, Sawai Land District. This the defendant had failed to do.

**[28]** While I am aware that records from such a long time ago may not have been kept, the fact remains that considering this case has not been tried or disposed off until recently (after both parties had been involved in litigations between them for such a long time in numerous courts), there could have been some foresight as to what documents were needed by the defendant to put in the balance against the plaintiff's claims.

**[29]** On the facts, I do not find that there are reasons for me not to accept the plaintiff's evidence that PW1 and PW4 did go to Lot 63, Sawai Land District to conduct the random survey. The absence of records need not make figures from the memory of the witnesses to be necessarily unreliable, as they were counting the number of trees on average for only two sizes.

**[30]** The defendant's position has gone from the Ministry's rejection letters, to wrong type of licence and eventually to no merchantable timber left on Lot 63, Sawai Land District. Despite its shareholders also having half of Paragro's, there did not appear to be any form of discussion or compromise on P15.

**[31]** The defendant appeared determined not to allow any leeway for P15 and rejected OT/9004 for reasons which sound sceptical. That the plaintiff may have obtained OT/9004 should go to the substance, not become any issue as to whether authority had been given to do so by the defendant or to pay for the security deposit.

**[32]** Having claimed that Lot 63, Sawai Land District had been clear fell by BLD leaving only pole sized timber left, the defendant's position changed when it was found that timber had been taken under OT licenses issued to Woodshine Sdn Bhd. If there is no merchantable timber left as claimed by the defendant, why there is a need for Woodshine Sdn Bhd to obtain timber licences to extract timber from Lot 63, Sawai Land District?

**[33]** Although timber extraction records were not produced as to how much timber had been extracted by Woodshine, there was an allegation through DW5 that all the timber had been used for construction of buildings, road, bridges, etc. Furthermore, DW5 could even offhand remember how much timber had been extracted from Lot 63 under OT licence.

**[34]** As to the timber shown under the satellite imagery exhibited as P12, the evidence of DW5 was that there was no merchantable timber on Lot 63, Sawai Land District in 2007 and that all the timber shown on P12 were cut and of no use; I am not prepared to accept this evidence unconditionally, particularly as DW2 had sought to explain that P12 showed trees that had grown up over 11 years.

**[35]** The fact that the defendant had written letters exhs P10 and P11 in order that a related company Woodshine Sdn Bhd could take out the same type of licence exhibited as P8 and P9 makes the court very suspicious of the motives of the defendant.

**[36]** The defendant had also alleged through the evidence of DW5 that in addition to the consideration of RM1.2m paid under P13, a sum of RM6m had been paid to Tay Choo Foo ('PW4') and Tan Soo Yin to obtain a virgin forest timber licence.

**[37]** If DW5 had truly maintained his testimony during re-examination that Tay Choo Foo was in breach of P15 by not obtaining the virgin forest licence after having been paid RM6m, it would not only be a departure from the defence but it would also appear strange that there was no mention about this until so late into the case.

**[38]** If there was little or no timber left on Lot 63, Sawai Land District, it would make more sense for the defendant's shareholders to deliberate the matter in Paragro Sdn Bhd with a view also to recover the said RM6m instead of taking the approach for this case to be thrashed out in court over a span of 14 years if truly the dispute was over so little or no merchantable timber to benefit from.

**[39]** I therefore have to take all of the conflicting testimonies of both parties and come to a decision as to where the balance of probability should lie.

**[40]** Having considered all of the evidence as well as the surrounding circumstances, I have come to findings that there were merchantable timber to be extracted from Lot 63, Sawai Land District which were not negligible or confined to poles as the defendant has contended.

**[41]** I also make a finding of fact for 40 tons of timber to be a realistic volume of the merchantable timber that could be extracted per acre from Lot 63, Sawai Land District had P15 been performed.

**[42]** As to the profit, I am inclined to accept from the evidence as a whole that a profit of RM250 per ton was achievable, which for an area of 12,000 acres would give a total profits of RM120m.

**[43]** As to the sum of RM20,000 being the security deposit paid for OT/9004, the evidence does not support an order for the defendant to refund the same to the plaintiff, as the said payment was claimed to have been made by PW4 using his own personal money.

**[44]** I therefore award the plaintiff damages assessed at RM120m to be paid by the defendant to the plaintiff together with interest at the rate of 8%pa from the 27 June 1995 until the date of full payment and costs to be taxed unless agreed.

**[45]** Order accordingly.

*Plaintiff's claim allowed with costs.*

Reported by Kohila Nesan